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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1239

CARROLL T. GLORIOSO,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

ON APPEAL FROM THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Table of Contents

	PAGE
Preliminary Comments	1
Opinion Below	1
Jurisdiction of the Court	2
Questions Presented	2
Constitutional Provisions Involved	2
Statement of Facts	2
Argument:	
I. The arrest and subsequent search of Petitioner was legally conducted	6
II. The search and seizure warrant for the apartment was issued upon a showing of sufficient probable cause	9
III. Petitioner may not now raise questions concerning (a) the failure to transcribe arguments of counsel absent a request therefor, (b) waiver of the right to a jury trial, and (c) sentencing as a second offender under the lottery laws allegedly placed Petitioner in double jeopardy	12
Conclusion	16

Table of Citations

Cases

Aguilar v. Texas, 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509 (1964)	9
Bailey v. Anderson, 326 U.S. 203, 90 L. Ed. 3, 66 S. Ct. 66 (1945)	13
Chicago, I. & L. R. Co. v. McGuire, 196 U.S. 128, 49 L. Ed. 413, 25 S. Ct. 200 (1905)	13
Davids v. State, 208 Md. 377, 118 A. 2d 636 (1955)	7

	PAGE
DeAngelo v. State, 199 Md. 48, 85 A. 2d 468 (1952)	8
Delnegro v. State, 198 Md. 80, 81 A. 2d 241 (1951)	8
Draper v. United States, 358 U.S. 307, 3 L. Ed. 2d 327, 79 S. Ct. 329 (1959)	10
Fletcher and Smith v. State, 6 Md. App. 219, 251 A. 2d 35 (1969)	14
Gatewood v. State, 244 Md. 609, 224 A. 2d 677 (1966)	10, 16
Graham v. West Virginia, 224 U.S. 616, 56 L. Ed. 917, 82 S. Ct. 583 (1912)	15
Gryger v. Burke, 334 U.S. 728, 92 L. Ed. 1683, 68 S. Ct. 1256 (1948)	15
Hensley v. United States, 281 F. 2d 605 (D.C. Cir. 1960)	15
Iannone and Glorioso v. State, 10 Md. App. 81, 267 A. 2d 812 (1970)	1
Johnson v. New Jersey, 384 U.S. 719, 16 L. Ed. 2d 882, 86 S. Ct. 1772 (1966)	13
Johnson v. State, 8 Md. App. 187, 259 A. 2d 97 (1969)	7
Johnson v. Zerbst, 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938)	14
Monks v. New Jersey, 398 U.S. 71, 26 L. Ed. 2d 54, 90 S. Ct. 1563 (1970)	13
Patton v. United States, 281 U.S. 276, 74 L. Ed. 854, 50 S. Ct. 253 (1930)	14
People v. Sailor, 43 Ill. 2d 256, 253 N.E. 2d 397 (1969)	15
Price v. State, 7 Md. App. 131, 254 A. 2d 219 (1969)	10
Oyler v. Boles, 368 U.S. 448, 7 L. Ed. 2d 446, 82 S. Ct. 501 (1962)	15
Robinson v. State, 4 Md. App. 515, 243 A. 2d 879 (1968)	6
Rose v. State, 177 Md. 577, 10 A. 2d 617 (1940)	15
Salmon v. State, 2 Md. App. 513, 235 A. 2d 758 (1967)	6
Singer v. United States, 380 U.S. 24, 13 L. Ed. 2d 630, 85 S. Ct. 783 (1965)	14
Spinelli v. United States, 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584 (1969)	9, 10

PAGE

State v. Jelks, 105 Ariz. 175, 461 P. 2d 473 (1969) 15

State v. Skaff, 22 Wisc. 2d 269, 125 N.W. 2d 561 (1964) 15

State v. Zimmerman, 261 Md. 11, 273 A. 2d 156 (1971) 15

Tompsett v. State of Ohio, 146 F. 2d 95 (6th Cir., 1944) 15

United States v. Ventresca, 380 U.S. 102, 13 L. Ed. 2d 684, 85 S. Ct. 741 (1965) 10

Wilkins v. State, 5 Md. App. 8, 245 A. 2d 80 (1968) 14

Statutes

Annotated Code of Maryland (1971 Repl. Vol.):
Article 27—

Section 366 15

28 U.S.C.A.—

Section 1257 2

Sections 1257 (2), 1257 (3) 13

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PRELIMINARY COMMENTS

This Brief in Opposition to the Petition for Writ of Certiorari is filed pursuant to the request of this Honorable Court.

OPINION BELOW

The opinion of the Court of Special Appeals of Maryland is reported at 10 Md. App. 81, 267 A. 2d 812 (1970). It is attached as Appendix E to the Petition for Writ of Cer-

tiorari (A. 9). The order denying the Petition for Writ of Certiorari in the Court of Appeals of Maryland dated October 20, 1970 (Misc. Docket No. 200, Sept. Term, 1970) is attached as Appendix F to the Petition for Writ of Certiorari (A. 15).

JURISDICTION OF THE COURT

Petitioner alleges that the jurisdiction of this Court is invoked under the provisions of Title 28, U.S.C.A., Section 1257.

QUESTIONS PRESENTED

1. Whether or not the arrest and search of the Petitioner was legally conducted.

2. Whether or not the search and seizure warrant in this case was issued upon a showing of sufficient probable cause.

3. Whether or not Petitioner may now raise questions concerning: (a) failure to transcribe arguments of counsel absent a request therefor, (b) waiver of the right to jury trial, and (c) that his sentence as a second offender under the lottery laws placed him in double jeopardy.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner fails to allege which provisions of the Constitution of the United States are involved though he claims under the heading of Jurisdiction that "rights, privileges and immunities are claimed under the Constitution of the United States."

STATEMENT OF FACTS

On June 13, 1968, at about 2:30 p.m., Lieutenant George Andrew, whose expertise in the investigation, apprehension, and detection of lottery and gamblers was stipulated,

was in the apartment across the hall from Apartment 910, Washington Park Apartments, 111 West Center Street, Baltimore, Maryland. In the apartment with him was FBI Agent David Faulkner, for the purpose of executing a search and seizure warrant for Apartment 910. Through a peephole he saw Petitioner come down the hall and heard him knock on the door of Apartment 910. He recognized Glorioso's voice. A man's voice asked, "Who is it?" and Glorioso responded, "It's me." At this point Lieutenant Andrew and Agent Faulkner opened their door and went out into the hallway. Andrew observed Faulkner go to the door at Apartment 910. The door was opened and Faulkner went in. Glorioso had one foot in Apartment 910 and one foot in the hallway. Lieutenant Andrew then pushed Glorioso the rest of the way into the room, advising him that he had a search and seizure warrant. He observed that the door to Apartment 910 had been reinforced by several two by fours and he had heard scrapings on the door after Glorioso's knock and exclamation. Considerable gambling paraphernalia, indicating a substantial operation, was in full view on the table inside the apartment.

Agent Faulkner testified that he had been with the Federal Bureau of Investigation for five years, and, in addition to normal lottery training in the FBI Academy, had been engaged in the investigation of lottery and other organized gambling crimes since August of 1967. While in the apartment across from 910 with Lieutenant Andrew, he had observed Glorioso leave his automobile on the parking lot outside the building; shortly thereafter saw him on the ninth floor; and heard him knock and state, "It's me." He also heard the sound of the apartment door unlocking and a barrier being let down from inside. The Agent stated he opened the door to Apartment 910 and entered and at

the time Glorioso was still in the hallway standing in front of the door. In a search of Glorioso, conducted subsequent to the discovery of the lottery paraphernalia as aforesaid, a key which fit Apartment 910 was removed from the person of Glorioso.

The affidavit in support of the search and seizure warrant is set forth as Appendix B to the Petition for Writ of Certiorari. In summary, it includes the following averments:

1. Agent Faulkner was advised by a proven reliable informant that Lesse Sellman, employed by Vincent and Tony Iannone (Atlas Vending Company), had advised the informant that Sellman had been given money by Tony Iannone to rent an apartment in Baltimore for the purpose of booking numbers.

2. Agent Faulkner was also advised that Sellman rented furniture with the money given him by Iannone to purchase furniture.

3. Faulkner had learned that Sellman had rented furniture for an apartment at 111 West Centre Street.

4. From the manager and desk clerk at the Washington Park Apartments, 111 West Centre Street, it was learned that Sellman and Tony Iannone had rented Apartment 910.

5. On May 31, 1968, Agent Faulkner heard from within Apartment 910 the sound of an adding machine and a male voice stating, "All we can take is $200" and "Lay off."

6. That one of the males who left this apartment entered an automobile registered to Atlas Vending Company.

7. That on the various dates of observation there was no activity in the apartment prior to 1:30 p.m. or after 6:00 p.m.

8. That one of the individuals seen in the vicinity of the apartment at 111 West Centre Street on four occasions was identified as Carroll Glorioso (Petitioner), who previously had been convicted of gambling charges.

9. Telephone company records revealed long distance calls from Apartment 910, including calls to a restaurant in Washington, D. C., the owners of which were arrested on gambling charges.

10. On one occasion Carroll Glorioso, after parking his car but before entering the apartment building, concealed sheets of white paper under his shirt.

11. That it was Agent Faulkner's opinion, based on his expertise in gambling investigations, that gambling activity was being conducted in Apartment 910.

At trial Petitioner made no request to transcribe argument of counsel and did not raise this point on appeal to the Court of Special Appeals of Maryland. At trial, after the Clerk had advised the three defendants, including Petitioner (as to pleas which had been entered at the time of their arraignment) their counsel (representing all three defendants) indicated that there would be no change in the plea of not guilty and when the Clerk asked if the trial would be by the court or by the jury, counsel, Alan H. Murrell, replied:

> "Your Honor, all three defendants have been advised of their constitutional rights to trial by a jury, and also have a right to elect, to waive their constitutional right, and elect trial before the court. And, having been fully advised of their rights, Your Honor, all three defendants in this case, Glorioso, Iannone and Sellman, at this time waive their constitutional right to trial by jury and pray trial before the court.
>
> "(The Clerk) As to the addendum.

"(Mr. Murrell) As to the addendum, with respect to the defendant, Glorioso, Your Honor, the plea is not guilty, concurrent trial.

"(The Clerk) Not guilty, court trial to each."

Petitioner was convicted of keeping a place for the sale of lottery and possession of lottery paraphernalia and sentenced to imprisonment for one year and a fine of One Thousand Dollars under both charges to run concurrently. He was, thereafter, convicted under the addendum as a second offender and sentenced to two years imprisonment to run concurrently with the sentences previously imposed.

ARGUMENT

I.

THE ARREST AND SUBSEQUENT SEARCH OF PETITIONER WAS LEGALLY CONDUCTED.

Leaving aside the question of the proper issuance of the search warrant, Petitioner alleges in his first and second arguments that the police did not have cause to arrest him since they pushed him from the public hallway into the apartment in which the gambling operation was conducted. Once the police were inside the apartment, they observed lottery paraphernalia in full view and the search of Petitioner conducted inside the apartment revealed that he was carrying a key which fit the door to the apartment.

The validity of the arrest and subsequent search of the Petitioner rests upon a determination of whether the police officers had probable cause to believe that a misdemeanor had been or was being committed in their presence or view. *Robinson v State*, 4 Md. App. 515, 243 A. 2d 879 (1968); *Salmon v. State*, 2 Md. App. 513, 235 A. 2d 758 (1967). In making the determination that the arresting officers had probable cause to believe that Petitioner was

violating the lottery laws, the police could rely upon both the facts known or observed by them as well as upon their expertise. *Davids v. State*, 208 Md. 377, 118 A. 2d 636 (1955); *Johnson v. State*, 8 Md. App. 187, 259 A. 2d 97 (1969).

Admittedly the search warrant for the apartment did not, in and of itself, afford grounds for the arrest of Petitioner, but those facts within the knowledge or observation of the arresting officers clearly afforded them probable cause to believe that the misdemeanor was being committed in their presence or view. The affidavit supporting the search warrant indicated that on four previous occasions Petitioner (known to the officers as having been previously convicted of gambling charges) had been observed in the vicinity of the apartment and on one occasion was observed to be concealing sheets of paper under his shirt as he left his car outside the apartment building. On the day in question, the police, Lt. George Andrew of the Baltimore City Police Department, and Agent David Faulkner of the Federal Bureau of Investigation, were hidden in an apartment across the hall from the apartment thought to contain the gambling operation, observing the door through a peephole. They observed Petitioner approach the door to the apartment, knock, and heard a man's voice from within the apartment ask "Who is it," to which Petitioner responded "It's me," and thereafter the police heard the door being unlocked, a barrier being let down from inside the door and the latch being taken off. As the door to the apartment opened, the police exited from their hiding place and armed with the search warrant, entered the apartment where they observed lottery paraphernalia in full view. At the instant that the police reached the door to the apartment, Petitioner either had one foot in the apartment or remained close to the door and was

pushed or ordered by the police to enter the apartment, where the arrest and search took place.

The Maryland courts have had occasion to examine particular arrests involving lottery operations challenged by persons who contend that they were simply private citizens or strangers lawfully entering the premises without knowledge of the gambling operations conducted therein. In *DeAngelo v. State*, 199 Md. 48, 85 A. 2d 468 (1952), the Court of Appeals of Maryland rejected the arrest of a person who entered a private dwelling which contained lottery tickets when no other facts connected the accused with the gambling operations. In *Delnegro v. State*, 198 Md. 80, 81 A. 2d 241 (1951), the Court upheld the arrest of persons, who entered the building through a heavily barred door containing a lookout window and who were carrying bags containing lottery tickets and money.

The lower court in the case at bar reasoned that Petitioner had been previously identified with the suspect apartment and that his obviously clandestine identification when he knocked upon the door was sufficient to permit him entrance through the door which had been reinforced by heavy wooden barriers. Before their arrival the police had secured the search warrant by demonstrating that they had probable cause to believe that the apartment in question was being utilized to conduct a lottery operation, and upon their entrance into the apartment, they could immediately observe gambling paraphernalia in full view.

On these facts, both the lower appellate court and trial court could conclude that the arresting police officers had sufficient knowledge to conclude that a misdemeanor was being committed by the Petitioner in their presence or

under their view and that the arrest and subsequent search of Petitioner was therefore properly conducted.

II.

THE SEARCH AND SEIZURE WARRANT FOR THE APARTMENT WAS ISSUED UPON A SHOWING OF SUFFICIENT PROBABLE CAUSE.

The principles by which to measure the validity of a search and seizure warrant have become firmly established through a long line of cases in this Court. The warrant must be supported by an application under oath which sets forth those underlying circumstances which would permit the issuing court or magistrate to judge independently the validity of the applicant's conclusion that illegal activities are or have been taking place on the premises to be searched. *Aguilar v. Texas*, 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509 (1964). *Spinelli vs. United States*, 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584 (1969) held basically that an informer's tip standing alone without further explanation of the underlying circumstances which lead the informer and the applicant to conclude that an illegal activity was taking place was not sufficient to establish probable cause for the issuance of the warrant. In oft quoted language, this Court there reiterated the established guidelines in this area:

> ". . . In holding as we have done, we do not retreat from the established propositions that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause, Beck v. Ohio, 379 U.S. 89, 96, 13 L. Ed. 2d 142, 147, 85 S. Ct. 223 (1964); that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, McCray v. Illinois, 386 U.S. 300, 311, 18 L. Ed. 2d 62, 70, 87 S. Ct. 1056 (1967); that in judging probable cause issuing magistrates are not to be confined by niggardly limita-

> tions or by restrictions on the use of their common sense, United States v. Ventresca, 380 U.S. 102, 108, 13 L. Ed. 2d 684, 688, 85 S. Ct. 741 (1965); and that their determination of probable cause should be paid great deference by reviewing courts, Jones v. United States, 362 U.S. 257, 270-271, 4 L. Ed. 2d 697, 707, 708, 80 S. Ct. 725, 78 A.L.R. 2d 233 (1960)."

To be added to this statement of general principles is the assertion that the resolution of doubtful or marginal cases should be largely determined by the preference to be accorded to judicial warrants. *United States v. Ventresca*, 380 U.S. 102, 13 L. Ed. 2d 684, 85 S. Ct. 741 (1965). While the underlying circumstances establishing the validity of the applicant's conclusions may be provided by factual details supplied by the informer alone, *Draper v. United States*, 358 U.S. 307, 3 L. Ed. 2d 327, 79 S. Ct. 329 (1959); it may also be established through simply reciting the informer's tip and coupling it with the underlying circumstance as demonstrated by the observations of the police applicants. *Spinelli v. United States, supra; Price v. State*, 7 Md. App. 131, 254 A. 2d 219 (1969); *Gatewood v. State*, 244 Md. 609, 224 A. 2d 677 (1966).

The Court of Special Appeals of Maryland recognized in this case that the undisclosed informer's reliability could not be established by the affiant's conclusory assertion that the informer "has furnished information which has proven to be reliable in the past." It found however, that when the information provided by the informer is corroborated by independent police work by the affiant and the details of this investigation and his observations are recited in the warrant application, the information may be collectively considered in determining the existence, *vel non*, of probable cause for the issuance of the warrant. The affidavit tendered in support of the application for search warrant

in this case is set out in full as Appendix B (A. 2-5). Its pertinent provisions are summarized in the opinion of the Court of Special Appeals of Maryland in this case as follows:

In the application for the warrant, the affiant, an F.B.I. Agent, recited that "a confidential informant who has furnished information which has proven to be reliable in the past" advised that Leslie Sellman was employed by Vincent Iannone, operator of the Atlas Vending Company; that two weeks prior to April 16, 1968, the informant was told by Sellman, who lived at 1210 North Calvert Street, that he had been given money by Tony Iannone to rent and furnish an apartment somewhere in Baltimore for the purpose of booking numbers; that on May 6, 1968, a representative of a furniture rental company advised the affiant that Sellman had rented furniture for an apartment at 111 West Centre Street (the Washington Park Apartments); that on May 7 and 22, 1968, representatives of the Washington Park Apartments advised that Sellman and Tony Iannone had together rented apartment 910 for one year; that on May 31, 1968, the affiant was standing in the public hall in front of apartment 910 at 4:35 p.m. when he overheard a male voice inside the apartment say "All we can take is $200.00," followed by the sound of an adding machine; that on the same day, the affiant heard a male voice inside apartment 910 use the words "lay off"; that at 5:40 p.m. the same day two males left apartment 910 and entered separate Cadillac automobiles, one of which was registered to the Atlas Vending Company; that on June 5, 6, 7 and 10 these same men, one of whom interim investigation revealed to be Glorioso, were again observed "in the vicinity" of apartment 910; that Glorioso had previously been convicted on gambling charges in 1966; that Sellman had previously been arrested in Philadelphia

and Las Vegas; that the telephone in apartment 910 was listed to Sellman and a number of long distance calls had been made therefrom, including calls to a Washington number listed to two named individuals arrested on gambling charges in January, 1968 and known to the Intelligence Unit of Internal Revenue Service to be conducting a large scale gambling operation in Washington; and that on June 12, 1968, Glorioso was observed to park his car, "conceal sheets of white paper" under the front of his shirt, and then go to the vicinity of apartment 910. On the basis of these allegations, the affiant concluded that gambling activity was being conducted on an interstate basis in apartment 910.

It may be asserted that the information contained in the application for the warrant contains far more than a mere suspicion on the part of the police that the lottery laws were being violated on the premises. The supporting information and observations of the police when coupled with their knowledge and expertise in the investigation of gambling operations gave substantial information on which the issuing magistrate might make an independent determination of the validity of the affiant's conclusion that illegal gambling activity was taking place on the premises.

III.

PETITIONER MAY NOT NOW RAISE QUESTIONS CONCERNING (a) THE FAILURE TO TRANSCRIBE ARGUMENTS OF COUNSEL ABSENT A REQUEST THEREFOR, (b) WAIVER OF THE RIGHT TO A JURY TRIAL, AND (c) SENTENCING AS A SECOND OFFENDER UNDER THE LOTTERY LAWS ALLEGEDLY PLACED PETITIONER IN DOUBLE JEOPARDY.

None of the questions presented by the Petitioner in his Arguments III, IV and V, were presented by him in the appeal to the Court of Special Appeals of Maryland.

That Court had no opportunity to pass on or even consider those points which Petitioner now attempts to raise for the first time.

In his Petition for Writ of Certiorari to the Court of Appeals of Maryland, Petitioner did contend that the sentence of two years imprisonment under the addendum charging Petitioner with being a second offender was a nullity because he contended that it increased the length of the sentence once imposed. In the same Petition for Writ of Certiorari, Petitioner contended that he had not voluntarily and understandingly waived his right to a jury trial. At no point in the Petition for Writ of Certiorari to the Court of Appeals did Petitioner attempt to raise the contentions that the failure to transcribe argument of counsel deprived him of his constitutional rights. By his failure to raise these points in the appeal to the Court of Special Appeals of Maryland, Petitioner was precluded from raising the same points in his Petition for Writ of Certiorari to the Court of Appeals of Maryland. This Court has repeatedly recognized that when the highest state court possessing jurisdiction over a particular appellate question has not been presented with that question sought to be reviewed, this Court has no power to review either directly or by Writ of Certiorari. *Johnson v. New Jersey*, 384 U.S. 719, 16 L. Ed. 2d 882, 86 S. Ct. 1772 (1966); *Bailey v. Anderson*, 326 U.S. 203, 90 L. Ed. 3, 66 S Ct. 66 (1945); *Chicago, I.L.R. Co. v. McGuire*, 196 U.S. 128, 49 L. Ed. 413, 25 S. Ct. 200 (1905); *Monks v. New Jersey*, 398 U.S. 71, 26 L. Ed. 2d 54, 90 S. Ct. 1563 (1970); 28 U.S.C.A., §§ 1257 (2), 1257 (3).

In the event that this Court determines to review any of these three questions presented here for the first time, Respondent submits that each fails for substantive reasons.

By failing to request that argument of counsel be transcribed, Petitioner waived his right to present this question on appeal. Petitioner makes no attempt to ascribe error or prejudice to any portion of the argument of counsel and simply seeks a right to review the entire record to discover possible errors not noted and objected to at the time of trial. It has been consistently held that appellate counsel has no right in Maryland to a transcript containing recorded bench conferences and argument of counsel absent a request therefor, and the failure to include such part of the trial proceedings in the appellate transcript does not constitute denial of the right of the accused to full appellate review of the case. *Fletcher and Smith v. State,* 6 Md. App. 219, 251 A. 2d 35 (1969); *Wilkins v. State,* 5 Md. App. 8, 245 A. 2d 80 (1968). It may be pointed out that had trial counsel objected at any point to the context of opposing counsel's argument, that portion of the trial relating to the objection and the trial court's disposition of the objection would be reflected in the trial transcript.

There is no question but that an accused in a state criminal trial may elect a court trial, thereby waiving trial by jury, provided that state imposed procedural standards are met. *Singer v. United States,* 380 U.S. 24, 13 L. Ed. 2d 630, 85 S. Ct. 783 (1965); *Patton v. United States,* 281 U.S. 276, 74 L. Ed. 854, 50 S. Ct. 253 (1930).

Petitioner's waiver of the right to jury trial must admittedly meet the test of *Johnson v. Zerbst,* 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938) which required a showing of an "intentional relinquishment or abandonment of a known right or privilege," which depends in each case "upon the particular facts and circumstances surrounding that case including the background, experience, and conduct of the accused." It has been held generally that the

defendant is bound by the action of his counsel who elects on behalf of the defendant to waive trial by jury in open court and in the presence of the defendant. *Rose v. State,* 177 Md. 577, 10 A. 2d 617 (1940); *Hensley v. United States,* 281 F. 2d 605 (D.C. Cir., 1960); *State v. Jelks,* 105 Ariz. 175, 461 P. 2d 473 (1969); *State v. Skaff,* 22 Wisc. 2d 269, 125 N.W. 2d 561 (1964); *People v. Sailor,* 43 Ill. 2d 256, 253 N.E. 2d 397 (1969); *Tompsett v. Ohio,* 146 F. 2d 95 (6th Cir., 1944). Recently, in *State v. Zimmerman,* 261 Md. 11, 273 A. 2d 156 (1971), the Court of Appeals of Maryland held that before the defendant could assert on direct appeal that he had not voluntarily and understandingly waived his right to jury trial (when the record reflected that the election for trial by the court had been made for him in open court by his counsel), he must affirmatively show that he had in fact not understood that he had waived his right to jury trial. The Court there indicated that the proper forum in such a case lay in Petitioner's right to seek post conviction relief. This approach takes on added meaning in this case where Petitioner makes no allegation that he now desires a Jury trial or that he had no knowledge that he was in fact waiving his right to trial by Jury.

Petitioner's final contention that his trial and sentencing as a second offender under the provisions of Maryland Code Annotated, Article 27, Section 366, placed him twice in jeopardy for the same offense has been rejected on numerous occasions by this Court. *Graham v. West Virginia,* 224 U.S. 616, 56 L. Ed. 917, 32 S. St. 583 (1912); *Oyler v. Boles,* 368 U.S. 448, 7 L. Ed. 2d 446, 82 S. Ct. 501 (1962). In *Gryger v. Burke,* 334 U.S. 728, 92 L. Ed. 1683, 68 S. Ct. 1256 (1948), it was stated:

> "The sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or

> additional penalty for the earlier crime. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one."

Maryland's highest court has applied the same second offender law to gambling violations without questioning its constitutional validity. *Gatewood v. State, supra.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari to the Court of Special Appeals of Maryland should not be granted.

Respectfully submitted,

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